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IN THE

Supreme Court Of The United States

October Term 1970

B. FRANK CASEY ..... *Petitioner*

vs. No. 70-353

STATE OF ARKANSAS ..... *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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REASONS FOR DENYING THE WRIT

I.

The first point presented by petitioner is that the principles enunciated in *Griffin v. California,* 380 U.S. 609 (1965) relative to the Fifth Amendment of the Constitution of the United States were violated at trial of this cause. In support of this assertion petitioner first states that comment by the Prosecutor in his argument on the defendant's failure to testify violates the Fifth Amendment to the Constitution of the United States in that it is an unwarrantable line of argument relating to the privilege against self incrimination. Petitioner notes that Arkansas is one of the States which recognized this rule (pursuant to Article 2, Section 8 of the Arkansas Constitution) even prior to the holding in the *Griffin* case.

Petitioner further asserts that a defendant who chooses to exercise his privilege against self incrimination is entitled to an instruction that the jury is not to draw any adverse inference from the exercise of such right. He then states that the Arkansas cases are in accord and that the reason why no such instruction was given prior to argument in his cause was due to the fact that none was requested. No objection was made at the time of the allegedly improper remarks and only upon conclusion of argument was a request for an instruction on exercise of the privilege requested. The request was denied as not being timely made. *Camp v. State*, 249 Ark. 1075 (1971) (See Petitioner's Appendix Page 6A and 7A). Respondent submits that contrary to petitioner's claim the holding below is not in conflict with the rule of *Griffin v. California*, supra, the principle enunciated in that decision having long been the law in Arkansas but was rather a foreclosure of consideration due to procedural failings on the part of petitioner's counsel for reasons known only to that counsel.

II.

Petitioner's second point is that the lower Court applied a rule of procedure in such a way as to unreasonably deprive petitioner of a constitutional right. Petitioner asserts that the trial court refused to give the requested cautionary instruction on the ground that it was not timely offered (prior to argument and with the remainder of the Court's charge) and that the instruction was unnecessary at that time because the issue was not raised until a time during argument. Petitioner states that an instruction could hardly be offered at that time because the argument had not taken place. Respondent submits that the trial

court, upon request, could and would have given an instruction relative to drawing inferences from accused not taking the stand and that the effect of such instruction would have carried through any statement made in argument relative to the accused not testifying. Petitioner's attorney, of course, could have objected at the time of the allegedly improper argument and have received a cautionary instruction relative to the statement. If this procedure had been followed petitioner would have had two instructions admonishing the jury not to draw inferences from his refusal to testify.

In this cause the Arkansas Supreme Court held that petitioner had not lodged a proper objection to the allegedly improper argument when the objection was not lodged at the time the statement was made. *Camp v. State*, supra. Constitutional rights may be waived by failing to raise an objection at the proper time, *Michel v. Louisiana*, 350 U.S. 91 at page 99, 100 L. Ed. 83 at page 92.

It is not the position of respondent here that federally protected constitutional rights can be denied through the use of a practice or procedure which has no reasonable base. The reason for the rule that an objection to argument of counsel must be made at the time of the statement is set forth by the Supreme Court of Arkansas in the case of *Jones v. State*, 248 Ark. 694, 453 S.W. 2d 403, where the Court stated:

> "Johnny James Jones, was found guilty of rape and sentenced to thirty years imprisonment. His plea for reversal is based on a single point, namely, alleged improper remarks in the closing argument of the prosecuting attorney.
>
> "The defendant elected not to testify. The prosecu-

tor made these statements concerning the whereabouts of the accused on the morning of the alleged rape:

> 'I leave you with a thought. Johnny James Jones knows where he was on that morning. . . . . Johnny James Jones knows where he was on the 9th of July at 8:30 in the morning. There are two people who know where he was — Mrs. Linda Hicks [prosecutrix] and Johnny James Jones.'

"Defense counsel immediately interposed this objection:

> 'Your honor, at this time I would have to object to the reference, "Johnny James Jones knows where he was on the 9th of July". We do not have to prove his innocence. The State proves guilt and Mr. Jones certainly does not have an obligation to tell the jury where he was.
>
> 'THE COURT: That's true. Your objection is sustained in that respect.'

"The closing argument was shortly concluded without further incident. Then followed the instructions to the jury as to forms of verdicts, whereupon the jury retired to deliberate. Shortly thereafter defense counsel moved for a mistrial 'with respect to Mr. Thompson's closing argument and his reference to the failure of the accused to take the stand and state his presence on the morning of July 9, 1969.' The motion was denied. Appellant contends here that the trial court committed reversible error in overruling his motion.

"The fallacy in the point for reversal lies in the fact that the second objection came too late. Our holdings are in accord with the general rule stated in Wharton's Criminal Law and Procedure (1957), § 2079.

> 'The remedy for any improprieties on the part of the prosecuting attorney in summing up is to interpose immediate objection. . . . Generally the argument must be interrupted at the moment it is made; to delay until the end of the argument is generally fatal . . . .'

"A case in point is *Shipp v. State*, 241 Ark. 120, 406 S.W. 2d 361 (1966). After the jury had retired, defense counsel moved for a mistrial because of an alleged improper statement made in the closing argument of the prosecuting attorney. We held that the objection 'came too late and the point cannot now be urged.' Also, see *Childs v. State*, 243 Ark. 62, 418 S.W. 2d 793 (1967). The reason for the rule is obvious. The most appropriate time for the trial judge to evaluate an error in the proceedings is at the time an error is made; in most instances the judge can cure any such error by appropriate admonition. In fact in the instant case we think the trial court could have removed any objectionable inferences contained in the prosecutor's statement had the proper request for admonition been timely made."

Respondent submits that the rule of practice applied herein has a rational basis in that if the objection is raised at the time of the statement there is no confusion on the part of the jury, counsel or the Court as to what statement is being objected to and for what reasons. To

allow the objection to be made at any later time would serve only to confuse the jury and the Court as to what particular comment and in what reference the comment was deemed objectionable. It is submitted that an objection at the time of the statement and a cautionary instruction is as effective a procedure for removing unwarranted comment from the minds of the jurors as can be had.

It is also asserted by petitioner that he is the victim of an alleged rule or practice of State criminal procedure on which the Arkansas cases give no clear notice. Respondent, in support of the rule requiring objection to be made at the time of the statement, would cite the Court to *Bell v. State,* 120 Ark. 530, 180 S.W. 186 (1915); *Stinson v. State,* 125 Ark. 339, 189 S.W. 49 (1916). The rule has been cited many other times, see *Jones v. State,* supra and cases cited therein, and probably earlier than the cases cited above. Those cases cited above were chosen only to illustrate that the rule had been in use in Arkansas a number of years.

CONCLUSION

For the reasons stated above respondent prays that the petition for Writ of Certiorari to the Supreme Court of Arkansas filed herein be denied.

Respectfully submitted,

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